Retained EU Law (Revocation and Reform) Bill

House of Lords

Response to marshalled list of amendments at Committee Stage – briefing 2 of 2

Amendments to Clauses 7 and 12-16

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A. Introduction

1. JUSTICE is an all-party law reform, rule of law and human rights organisation. It is the UK section of the International Commission of Jurists.

2. **JUSTICE has already produced a briefing on the Retained EU Law Bill (“**the Bill**”) as a whole, which can be found here.** It provides case studies and highlights 3 key issues:

   a. First, the Bill’s sunset clauses will rush the huge task of reviewing retained EU law (“**REUL**”). The Bill imposes unnecessary deadlines, placing an unnecessary strain on Government resources and posing an unnecessary risk to individuals and businesses.

   b. Second, the Bill seeks to give courts mandatory factors to consider when determining whether to overturn retained case law. These factors are unnecessary and neglect the importance of legal coherence, clarity and certainty.

   c. Third, the Bill is a “Skeleton Bill” which:

      i. gives insufficient information to the public about the policy which will guide decisions to keep or delete law in different areas (e.g. employment law, environmental law), with no obligation to consult the public; and meanwhile

      ii. gives the Government excessive power to significantly change the objective, substance and impact of the law, with very little Parliamentary scrutiny.

3. **JUSTICE’s recommendations for amendments are in three corresponding categories:**

   a. First, the sunset clauses should be removed from the Bill. At a minimum, we support amendments to clauses 1-3 of the Bill which could minimise the impact of the sunset clauses on Parliamentary scrutiny, legal uncertainty and the inadvertent deletion of law (including of law in areas of devolved competence).

   b. Second, the mandatory factors in clause 7 for courts considering whether to overturn case law should be deleted, or at a minimum legal certainty should be included as a factor.

   c. Third, the use of a “Skeleton Bill” to reform so much law with executive powers should be reconsidered. At a minimum, the powers in clause 15 and 16 must be limited.

4. This briefing highlights amendments supported by JUSTICE **in the second and third categories**. This is further to our briefing on amendments in the first category to clauses 1-3 (the sunset clauses) circulated ahead of the first day of Committee on 23rd February 2023, which can be found here.

B. Clause 7 and case law in the courts

5. It is inevitable that the courts will need to reconsider some previously authoritative legal decisions, since the supremacy of EU law is abolished by the Bill (clause 4). Clause 7 subsections (1) to (7) seek to change the current rules for higher appeal courts[1] when considering whether to depart from case law.

6. The higher appeal courts in the UK are already not bound by retained EU case law,[2] and can already depart from case law if it is "right to do so".[3] This test is well-established, having been set out in a House of Lords practice statement in 1966.[4]

7. The Court of Appeal comprehensively considered the power to depart from retained EU case law in the case of *TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441. The Court considered several factors were relevant:
   a. changes in the domestic legislation;
   b. changes in the international legislative framework;
   c. the experience of the CJEU in confronting the relevant issues, for example having done so in a variety of factual scenarios;
   d. whether there is a clear basis for departing from the law in academic commentary and criticism;
   e. If there is any settled and consistent guidance on the question from the case law of courts outside the EU;
   f. if there is a coherent and consistent way to depart from some of the case law, but not other parts of it; and
   g. any legal uncertainty which would be created.

8. In doing so, the court made a comprehensive analysis and balanced reasons why the court should and should not overturn settled case law, with regard not only to the proper development of the law, but also to the need to ensure coherence, clarity and certainty.

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[1] "Relevant appeal courts" are the Court of Appeal, the Supreme Court or the High Court of Justiciary, and other higher "appeal" courts listed in clause 6(7): the Court Martial Appeal Court, the Inner House of the Court of Session, the High Court of Justiciary when sitting as a court of appeal; the court for hearing appeals under section 57(1)(b) of the Representation of the People Act 1983; the Lands Valuation Appeal Court; the Court of Appeal in Northern Ireland.

[2] Section 6(4) EUWA 2018 provided that the Supreme Court and the High Court of Justiciary were not bound by retained EU case law. The Court of Appeal and the other appellate courts listed above at fn 41 were added by The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525)

[3] Section 6(5) EUWA 2018

[4] HL Deb 26 July 1966 Vol 276 col 677. The Supreme Court has confirmed its continued use of it, see *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, paras 24-25.

9. **Legal certainty is a central factor.** As was recognised in the House of Lords 1966 practice statement, "precedent [is] an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules but essential elements to good law-making."[5]

10. It goes on to explain the balance between the need not to "unduly restrict the proper development of the law […] with too rigid adherence to precedent" whilst "bear[ing] in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law."[6]

11. **However, the Bill completely overlooks the importance of legal certainty.** For retained EU case law (or *assimilated* EU case law after 2023) the Bill removes the "right to do so" test, and lists new mandatory factors for courts to consider at clause 7(3):

    a. the fact that decisions of a foreign court are not (unless otherwise provided) binding;

    b. any changes of circumstances which are relevant to the retained EU case law; and

    c. the extent to which the retained EU case law restricts the proper development of domestic law.

12. For domestic case law which interprets or applies REUL, the test is still if it is "right to do so" but mandatory factors are also listed for the court to consider at clause 7(4):

    a. the extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart;

    b. any changes of circumstances which are relevant to the retained domestic case law;

    c. the extent to which the retained domestic case law restricts the proper development of domestic law.

13. JUSTICE considers these factors to be unnecessary:

    a. The first "that decisions of a foreign court are not (unless otherwise provided) binding" is strange and tautological, since it simply restates s.6(4)(ba): "a relevant appeal court is not bound by any retained EU case law (except so far as there is relevant domestic case law which modifies or applies the retained EU case law and is binding on the relevant appeal court)."

[5] HL Deb 26 July 1966 Vol 276 col 677.

[6] Ibid

b. The second simply states what is common sense, since changes in circumstances would be taken into account in any event, as can be seen in *TuneIn.*

c. And the third is already an established factor, as it is included in the House of Lords 1966 Practice Statement.

14. The most concerning problem with the factors is that they are incomplete. They all promote overturning case law but miss any reference to the coherence, clarity and certainty of the law. As a result, the section is unbalanced and flawed. We do not agree with the Government's concerns expressed in the Public Bill Committee, that any additional factors would "reinforce excessive influence of the European courts".[7] The abolition of EU Supremacy is clear and unambiguous on the face of the Bill, and the courts' power to depart from case law is similarly clear. A more balanced approach would not reinforce excessive influence, but rather offer the opportunity for full consideration of all elements.

JUSTICE's position on amendments to Clause 7

15. **Our principle recommendation is that Clause 7(1) – (7) be deleted.** The courts have shown they are able to consider all relevant factors in the case of *TuneIn*, thus the mandatory factors are an unnecessary encroachment on the judicial task.

16. **In the alternative, JUSTICE considers a more balanced approach is required, which does not omit the importance of legal coherence, clarity and certainty, particularly the latter.**

17. JUSTICE therefore supports the addition of mandatory factors which reflect the importance of legal coherence, clarity and certainty. We particularly note **amendments 85 and 88** which add the following factors to both subsections (3) and (4):

> **"**(d) the consequences of disturbing a settled understanding of the law;
>
> (e) the importance of legal certainty, clarity and predictability."

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[7] Public Bill Committee Deb (Bill 156) 24 November 2022, col 199.

B. A "Skeleton" Bill

18. In our second reading briefing, we highlighted our concerns about the lack of policy substance accompanying the Bill which we and many others have described as skeletal. Since then, the Secondary Legislation Scrutiny Committee ("SLSC") and the Delegated Powers and Regulatory Reform Committee ("DPRRC") have both expressed significant concern about the skeleton-like nature of the Bill in recent reports.
19. The DPRRC has described the Bill as "hyper-skeletal" and noted its approach "contradicts pledges by the Government since 2018 that Parliament would be the agent of substantive policy change in these areas" instead making the Bill a "blank cheque placed in the hands of ministers".[8] It recommends the removal of Clause 10 (which downgrades the scrutiny of secondary legislation amending REUL) and the removal of the delegated powers in clauses 12, 13 and 15.
20. Meanwhile SLSC has assessed the Bill to be "an extreme example of a skeleton bill" which "would lead to a significant shift of power not to Parliament but to ministers."[9] On any secondary legislation made under clauses 12, 13, 15 and 16, SLSC recommends there should be "a requirement [for ministers] to consult" and an "enhanced scrutiny mechanism" for changes "of such policy significance that the usual 'take it or leave it' procedures —even if affirmative—should not apply". SLSC further calls for "every instrument laid under the bill to be accompanied by a clear, accessible and comprehensive explanatory memorandum; complete and comprehensive impact information and thorough and timely post-implementation reviews".

The powers in the Bill

21. The executive powers in the Bill are extraordinarily broad.
22. Clauses 12 and 13 give ministers the power to restate REUL in secondary legislation.[10] In the restated law, ministers can use different "*words or concepts"* from the original instrument and make "*any change*" considered "*appropriate*" to: (i) resolve ambiguities; (ii) remove doubts or

[8] DPRRC, 25th Report of Session 2022-23, 2 February 2023 - HL Paper 147.

[9] SLSC, *Losing Control?: The Implications for Parliament of the Retained EU Law (Revocation and Reform) Bill* 28th Report of Session 2022-23 - published 2 February 2023 - HL Paper 145.

[10] Clause 12 provides the power to restate REUL up to the point of the sunsetting provisions, whilst clause 13 provides for the power to restate "assimilated law" after the sunsetting provisions. Assimilated law is a term coined in clause 6 of the Bill, and refers to REUL after 31 December 2023, when any remaining REUL, which is not revoked or automatically deleted by the sunset clause, will cease to have any special status, and will simply be "assimilated" domestic law.

anomalies; or (iii) facilitate improvement in the clarity or accessibility of the law (including omitting anything which is deemed by ministers to be legally unnecessary).

23. The powers in clause 15 go even further.

    a. Clause 15(1) confers a power to revoke legislation.

    b. Clause 15(2) confers a power to make whatever alternative law a minister "*considers appropriate*" to achieve the "*same or similar objectives*" (note that the objective need not be identical, only similar).

    c. Clause 15(3) goes even further still: a sweeping power to *"make such alternative provision as the relevant national authority considers appropriate*".

    d. **There is therefore no requirement for legislation made under clause 15(3) to be similar to the REUL it replaces.**

24. Furthermore, the restrictions on clause 15 powers are limited. The overall effect of the changes cannot "*increase the regulatory burden*";[11] establish a public authority or impose taxation.[12] However ministers can:

    a. create criminal offences or impose monetary penalties as long as they "*correspon[d]*" or are "*similar to*" offences/penalties being replaced.[13]

    b. confer the power to make subordinate legislation as long as it "*corresponds*" or is "*similar to*" a power being replaced.[14]

    c. confer any other functions or discretions on any person.[15]

    d. and while they cannot increase the regulatory burden, **there is no restriction on the extent to which people's protections or rights can be decreased.**

25. Furthermore, clause 15 replacements can amend primary legislation, if the secondary REUL (or after sunset, secondary assimilated law) being replaced itself amended primary legislation. This means clause 15 can be used as a Henry VIII power.

26. Finally, some replacements are automatically subject to the affirmative procedure: those which amend primary legislation, confer a power to make subordinate legislation or create a criminal

[11] Clause 15(5). The definition of burden is wide, from an "*administrative inconvenience*" to criminal sanctions (Clause 15(10))

[12] Clause 15(4)(f)

[13] Clause 15(4)(c) and (d)

[14] Clause 15(4)(a)

[15] Clause 15(4)(b), subject to clause 15(4)(a) ie the constraints on the power to make subordinate legislation.

offence; or are made under Clause 15(3).[16] Anything else under clause 15(2) can be subject to the negative resolution procedure, subject to a sifting process.[17]

27. **Clause 16 contains an indefinite power to update**, taking account of changes in technology, or developments in scientific understanding.[18] This power:

    a. **Is overly broad:** Ministers can make any changes they "*conside[r] appropriate*", regardless of how contentious any scientific advancement or change in technology is.

    b. **Lacks sufficient scrutiny**: it is unclear why clause 16 is only subject to the negative resolution procedure and not the sifting procedure, unlike clauses 12, 13 and 15.[19]

28. **In summary, Clauses 12-16 ask Parliament, pre-emptively, to write the executive a license to legislate at an extraordinary scale with overly broad powers**. JUSTICE considers this to be contrary to the Bill's stated aim "*to firmly re-establish our Parliament as the principal source of law in the UK*"[20] as well as being a manifestly undemocratic way of changing the law.[21]

29. **Annexed to this briefing are two case studies which provide examples of the possible impact of the powers on two instruments of retained EU law.**

JUSTICE's position on amendments to Clauses 12-16

30. JUSTICE is unaware of a more skeletal bill having been laid before Parliament. There is insufficient clarity on the policy, process and full extent of the law that will be affected by this legislation, despite the widespread impact it could have on the general public.

31. **JUSTICE recommends the Bill's sweeping approach to reforming REUL using a Skeleton Bill is urgently reconsidered. JUSTICE supports the approach taken in financial services and markets, i.e. taking discrete policy areas separately in primary legislation.**

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[16] Schedule 3 para 7(2) of the Bill

[17] The sifting process, first introduced by the EUWA 2018, allows ministers to propose the negative procedure, whilst providing committees of both houses with a draft of the instrument and a memorandum explaining why the procedure is considered appropriate. However, even if the negative procedure is not agreed by either committee to be appropriate, the minister can proceed in any event. See Schedule 3 para 8 of the Bill.

[18] The indefinite updating power applies to any REUL, any assimilated law, and any replacement/restated law made under the powers contained in sections 12, 13 or 15.

[19] See above.

[20] Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee, 20 Sept 22, p1

[21] JUSTICE is far from the only organisation to come to this conclusion. See for example the Opinion of Sir Jeffrey Jowell KC and Jack Williams for the RSPB, 17 February 2023, available here.

32. JUSTICE therefore primarily supports amendments which oppose Clauses 12-16 standing part of the Bill.

33. JUSTICE further supports amendments designed to probe the clarity of policy in discrete areas. We consider "carve out" amendments, such as **amendment 113** (exempting toy safety, asbestos, civil aviation, and other regulations from Clause 15) and **amendments 129 and 146** (exempting food safety) to be useful in this regard, although JUSTICE does not consider such carve outs to be a satisfactory solution to the Skeleton Bill in and of themselves.

34. Furthermore, while JUSTICE primarily considers the powers should not exist in such a skeletal Bill, it also supports amendments designed to restrain the ways in which they could be exercised in a particularly excessive and/or undemocratic way. For example:

    a. If they were exercised without any due consultation with effected individuals and businesses. JUSTICE particularly supports **Amendments 111 and 128** which require consultation with affected individuals and a report for Parliament addressing the scope of the restatement and its impact on consumers, workers, businesses, the environment and animal welfare. JUSTICE also notes **amendments 102, 105, 107**, **112, 115 and 116** which impose consultation requirements.

    b. If the powers were exercised to produce regulations which substantially changed policy and which should properly be outside the delegated powers of ministers and be instead a matter for Parliament.

        i. With respect to Clause 12 and 13 "restatements" (which would only require the negative resolution procedure), see **amendment 114** which attempts to limit the permitted regulations by replacing the requirement that restatements have the "*same or similar objectives*" with the "*same or similar effects*".

        ii. With respect to Clauses 15 and 16 regulations, see **amendments 119 and 127** which prevents any regulations under Clause 15 which would "effect substantial policy change so far as it relates to human rights, equality or environmental protection legislation with effect in Northern Ireland".

    c. If the powers to revoke, restate, codify or replace were unilaterally exercised by central Government ministers in areas of devolved competence or in areas covered by the without consent. See **amendments 103, 106, 118, 135 and 141** which require consent before this occurs. See further **amendment 117** which requires consent for any regulations in areas covered by the Common Framework.

35. JUSTICE further supports amendments which enhance the transparency of the Government's processes and/or the scrutiny of Parliament.

a. See **amendment 132** which seeks to improve the transparency of the Government's review of retained EU law, by requiring the Government to publish criteria on how decisions whether to retain amend or remove retained EU law will be made democratic legitimacy of the Clause 12-16 powers, either through consultation or through enhanced Parliamentary Scrutiny.

b. See **amendment 141A** which introduces a Joint Committee of both Houses for sifting regulations made under Clause 15. Where the Committee judged it appropriate, for example when regulations represented a significant change from existing law, the Committee would be able to refer instruments to a process allowing Parliament a substantive say over their contents.

36. Finally, JUSTICE specifically notes the only substantive policy restriction on replacement regulations to have been given statutory footing in the Bill is the requirement *not* to increase regulatory burdens at Clause 15(5). JUSTICE supports any amendments which probe what this means, and why the Government is willing to include it but no other substantive policy commitments or restrictions in the Bill. For example, those which prevent regulations from undermining standards in areas such as product safety, consumer rights, environmental protections, employment rights, etc.

a. See **amendments 120 and 121** which probe the benefits and intent behind the policy restriction in Clause 15.

b. **Amendments 126 and 130** insert new requirements (in relation to Clauses 15 and 17[22] respectively) that regulations must not reduce environmental protections, reflecting commitments given by the Government during the passage of the Bill that environmental standards will be maintained or enhanced,[23] whilst **amendment 134A** provides a catch all amendment to that effect.

c. **Amendment 129** inserts a requirement that new regulations will not weaken or reduce the level of protection of consumers in relation to the safety, composition or labelling of food.

[22] Clause 17 extends an existing power in s.1(6) of the Legislative and Regulatory Reform Act 2006 – to remove or reduce burdens in legislation – to retained direct EU legislation.

[23] As stated by Bill Minister Nusrat Ghani MP at the report stage of the Bill in the House of Commons: ''The Department for Environment, Food and Rural Affairs has committed to maintain or enhance standards" 18th January 2023, HC Vol 726 Col 395

Annex

Example 1: Parental Leave

1. The right to parental leave is contained within REUL.[24] It is different from maternity or paternity leave: it entitles parents, after they have been in their job for one year, to be absent from work for a set period to care for a child.[25] Employers can only postpone it narrow circumstances: when the operation of the business is "unduly disrupted".[26] As currently drafted, the Bill could be used to change parental leave substantially, with minimal Parliamentary scrutiny.
2. Restatement regulations under clause 12 or 13 could purport to "*clarify*" the test using different words and concepts, which in practice would weaken the test, e.g. replacing the test with simply "*disrupted*" or even "*caused inconvenience*". This could all be done using the negative resolution procedure.
3. Replacement regulations under clause 15 could go further. Ministers could decide to give employers' the power to refuse leave, rather than just postponing it, interpreting such change as having a "*similar objective*" (of creating provision for parental leave whilst protecting businesses from being disrupted). This would reduce the burdens on businesses, and therefore be permissible. Since this would be under clause 15(2), such regulations would not require the affirmative procedure.
4. Ministers could go even further under clause 15(3). They could decide to radically overhaul the right to parental leave under clause 15(3), simply if they "*conside[r it] to be appropriate*". Alternative provision would not need to have a similar objective; this overhaul could impose limits, restrictions and exemptions, all permissible as long as they reduce the burdens on employers. This is despite the potential for such an overhaul to curtail the rights of employees significantly and indeed go against the best interests of children. These regulations would have to be under the affirmative procedure.
5. Finally, the right to parental leave could cease to exist in UK law due to the sunset provisions, with no scrutiny from Parliament whatsoever.

[24] The Maternity and Parental Leave etc Regulations 1999 implement the EU Council Directive 96/34/EC (OJ No.L145, 19.6.96, p.4).

[25] Reg 13 of the Maternity and Parental Leave etc Regulations 1999 (MPLR 1999); for up to 4 weeks per year per child, and up to a total of 18 weeks per child, reg 14.

[26] Schedule 2 MPLR 1999

Example 2: Young witnesses whose age is unclear in criminal proceedings

6. REUL currently secures the protections available to young witnesses in court. Child victims are automatically given protections in court (often known as 'special measures', for example giving evidence by video link), however there was previously no automatic eligibility in UK law for those whose age is unclear. Due to EU Directives,[27] domestic law was amended[28] to include a presumption that trafficking victims and victims of sexual abuse can be treated as children for the purposes of special measures, if their age is unclear but there is reason to believe they are under 18.
7. As currently drafted clause 15 would allow a minister to revoke the regulations, removing the above protections (clause 15(1)). Or they could amend the protections to exclude any child who was not proven to be 18 if the minister considered that alternative approach to be "*appropriate*" (clause 15(3)).
8. Alternatively, clause 16 could be used to impose a requirement for scientific testing of a child's age, rather than using a presumption of eligibility if their age is unclear.[29]
9. Since this REUL in fact amended a domestic enactment, it should be noted that the sunset clause will *not* automatically delete the provision (see clause 1(3)).

[27] Directive 2011/36/EU and Directive 2011/93/EU on child victims of human trafficking and sexual abuse, respectively.

[28] s. 33 of the Youth Justice and Criminal Evidence Act 1999, amended by the Trafficking People for Exploitation Regulations 2013 and the Special Measures for Child Witnesses (Sexual Offences) Regulations 2013

[29] JUSTICE hopes this is unlikely, however Section 52 of the recent Nationality and Borders Act 2022 included a provision for ministers to themselves deem what scientific methods are appropriate for age assessments and make regulations specifying such methods, This is despite professional organisations expressing significant concern at the reliability of any current scientific testing to determine age, For example, the Royal College for Paediatrics and Child Health, see House of Commons library, *Nationality and Borders Bill*, p58.